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# THE ENVIRONMENT, THE FREE MARKET, AND PROPERTY RIGHTS: POST-*LUCAS* PRIVATIZATION OF THE PUBLIC TRUST

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## INTRODUCTION

In the wake of the Supreme Court's decision in *Lucas v. South Carolina Coastal Council*,[1] the public trust doctrine is poised to become a renewed presence in the courts.[2] Though this common law doctrine traditionally effectuated public access to tidal waters for fishing, boating, or commerce, the doctrine's recent American history has been marked by expansion. The doctrine now encompasses all navigable waters, and the triad of interests historically served by the doctrine has been judicially expanded to include more general recreational and ecological interests.[3]

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1. 112 S. Ct. 2886 (1992).

2. The resurrection of the public trust doctrine began shortly after the *Lucas* decision, when the Oregon Court of Appeals ruled that the public possessed the right to use the dry sand area of the coastal zone and held that this right was superior to any private owner's property interest. The court implied that because the public trust precluded any transfer to private title, "the purportedly taken interest was not part of plaintiff's estate to begin with." Stevens v. City of Cannon Beach, 835 P.2d 940, 942 (Or. Ct. App. 1992), *cert. denied*, 114 S. Ct. 1332 (1994). Therefore, there was no taking under the Oregon or United States Constitutions. *Id.*

3. Such judicial expansion of the public trust was first espoused in an article published in 1970 as a means to judicially develop comprehensive resource management. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). For a discussion of the case law which has advanced this expansion, see *infra* pp. 14-16.

Concurrent with this expansion in the courts, extensive environmental regulatory schemes have been passed by the legislature.[4] Reacting to these schemes, courts have imposed obligations on private landowners in the interest of furthering perceived environmental benefits.[5] Environmental activism and the paths of the public trust doctrine are now in conflict with the Fifth Amendment's provision of just compensation. Mr. Lucas, a property owner, asked the Supreme Court to interpret the relationship between an environmental regulation and the Fifth Amendment, but the outcome appears to have drawn the public trust doctrine more tightly into the morass of conflict.

In *Lucas*, the United States Supreme Court examined the impact of an environmental regulation, the South Carolina Beachfront Management Act (Act),[6] upon private property rights.[7] The Act, which was upheld by South Carolina's highest court,[8] directed the Coastal Council to establish a baseline along the shore, seaward of which habitable improvements would be prohibited.[9] This baseline effectively barred the development of any habitable structures on two residentially zoned lots which Mr. Lucas had acquired two years previously for $975,000.

The United States Supreme Court held that any regulation so severe as to prohibit all economically beneficial use of land is a categorical taking warranting just compensation, regardless of the public benefit, unless the limitation inflicted upon the property inheres in the title itself.[10] "Where

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4. National Environmental Policy Act (NEPA), 42 U.S.C. § 4321-4370d, Pub. L. No. 91-190, January 1, 1970, 83 Stat. 852, as amended; Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601-9675, Pub. L. No. 96-510, December 11, 1980, 94 Stat. 2767, as amended; Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1251-1387, Pub. L. No. 92-500, October 18, 1972, 86 Stat. 896, as amended; Clean Air Act, 42 U.S.C. § 7401-76719, Pub. L. No. 88-206, December 17, 1963, 77 Stat. 401, as amended.

5. The Fifth Amendment of the United States Constitution states in part: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The practice of avoiding such obligation is not entirely recent. *See, e.g.*, Patton v. City of Wilmington, 147 P. 141, 146 (Cal. 1915) (Henshaw, J., concurring). Justice Henshaw reasoned that the fictional jus publicum/jus privatum distinction was "declared, or rather, I should say, was created by this court." *Id.* The Justice further stated that:

> [T]he people of California were for the first time advised that this state, in offering for sale the fee of certain of its tide lands, without the slightest reservation of any rights . . . and in making grants and patents . . . and in taking its citizens' money . . . was practicing the art of Jeremy Diddler by hoodwinking its citizens into the belief that they were acquiring a fee simple to lands, whereas in fact they were but acquiring a nondescript jus privatum which entitled them to use the lands until the state should retake them.

*Id.*

6. S.C. CODE ANN. §§ 48-39-10 to -360 (Law. Co-op. 1976 & Supp. 1993).

7. 112 S. Ct. 2886.

8. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895 (S.C. 1991).

9. S.C. CODE ANN. § 48-39-280 (directing council to establish baselines); S.C. CODE ANN. § 48-39-290 (prohibiting new construction or reconstruction seaward of the baseline).

10. *Lucas*, 112 S. Ct. at 2899.

the State seeks to sustain regulation that deprives land of all economically beneficial use... it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[11] The Court ruled that the Coastal Council had not justified the total regulatory taking of Mr. Lucas's land.[12]

The Court remanded the case to the South Carolina Supreme Court to allow the Coastal Council to identify background principles of nuisance and property law that would restrain Mr. Lucas from constructing a habitable structure on his land.[13] The South Carolina Supreme Court established that no such principles applied to Mr. Lucas's facts and remanded the matter to the lower court for a determination of proper compensation.[14] After *Lucas*, courts must look to the inherent restrictions of state nuisance and property law that define the traditional limits of property rights before awarding just compensation. Because courts have already recognized the public trust doctrine as a traditional property limitation,[15] a resurgence of the public trust doctrine seems certain as states seek theories to avoid paying otherwise appropriate compensation.[16] Courts will find fertile precedent establishing the public trust as a

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11. *Id.* at 2899.

12. *Id.* at 2900.

13. *Id.* at 2901-02.

14. Lucas v. South Carolina Coastal Council, 424 S.E.2d 484, 486 (S.C. 1992). Subsequently, Mr. Lucas settled his claim against the state of South Carolina for $425,000 per lot and $725,000 for attorneys' fees, costs, and interim interest. Joint Statement, signed by Bachman S. Smith, III, of Sinkler & Boyd, P.A., Attorneys for the South Carolina Coastal Council and the State of South Carolina, and Gerald M. Finkel, of Finkel, Goldberg, Sheftman & Altman, Attorneys for David H. Lucas (undated) (on file with author).

Cotton Harness III, general counsel for the Coastal Council, has since indicated that the state would resell the property to another developer to recover some of its costs of settlement. Harness said that the new buyers will be permitted to develop the sites subject to normal beachfront restrictions, saying that, "People are quite willing to buy beachfront property." David Lucas in turn called the state's decision to permit development "the height of hypocrisy." Kenneth Jost, *South Carolina Settles Lucas Case*, CAL. PLANNING & DEV. REPORT, Aug. 1993, at 5.

15. Public trust issues are governed solely by state law and do not raise federal jurisdiction questions. *See, e.g.*, New York v. Delyser, 759 F. Supp. 982, 990 (W.D.N.Y. 1991) ("the State's rights and duties with respect to these lands are governed purely by state law, and the claims based on the public trust doctrine therefore do not "arise under" federal law within the meaning of 28 U.S.C. § 1331(a)"); Wisconsin v. Baker, 698 F.2d 1323, 1327 (7th Cir. 1983), *cert. denied*, 463 U.S. 1207 (1983) (whether the state owned navigable waters in trust for the public was "entirely a matter of Wisconsin law, subject only to the exercise by the United States of one of its constitutional powers"); Montana v. United States, 450 U.S. 544 (1981) (holding that title to submerged lands under navigable waters is governed by state law subject only to the federal interests in interstate and foreign commerce).

*But see* Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 425-26 (1989) ("The public trust doctrine is complicated—there are 51 public trust doctrines in this country alone...." Wilkinson posits that there is a doctrine adopted by each state and a 51st federal doctrine.).

16. For the earliest post-*Lucas* construction of a property limitation, see *Stevens*, 835 P.2d 940.

traditional limitation upon the use and even the ownership of property.[17]

However, widespread acceptance of the public trust doctrine has not always led to desired environmental goods.[18] Though well-intended, such ill-defined goods allow the free-riding public to suffer while natural resources continue to be degraded. This article encourages courts to reexamine the public trust doctrine in light of unprecedented consumptive pressures on our natural resources and the consequent importance of efficient resource management. The current environmental course of legislative, regulatory, and judicial activism is perhaps not as wise as once believed. Therefore, this article advocates a changed course in the environmental arena.

To determine the totality of both intended and unintended impacts, this article measures change not by good intentions but by the overall effects of implementation.[19] Justice Stewart similarly rejected measuring only well-meaning intentions:

> As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property rights were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*.[20]

Judicial acceptance of ill-defined though well-intended environmental goods has not been successful. Therefore, courts should pursue a new path which renews the constitutional premise of this nation's liberty and property rights.

This article begins by tracing the history of property rights and the evolution of the public trust doctrine. Next, the article emphasizes the most recent judicial expansions of the public trust doctrine and discusses resource costs derived from the expansion of the doctrine. The article concludes with a seemingly paradoxical recommendation: the privatiza-

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17. *See* Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892) (one of the earliest cases establishing the public trust as a limitation on private property). In California, however, properties subjected to the public trust may still warrant compensation. California v. Superior Court of Placer County (*Fogerty*), 625 P.2d 256 (Cal. 1981), *cert. denied*, 454 U.S. 865 (1981) (subjecting property along the shores of Lake Tahoe to the public trust). These property owners again appealed to the United States Supreme Court for certiorari, claiming they deserved compensation. Fogerty v. California, 484 U.S. 821 (1986). The Attorney General for Respondent, State of California, opposed certiorari, claiming that whether the establishment of the public trust on longstanding property rights amounted to an unconstitutional taking was not ripe for review. Respondent's Brief in Opposition to Certiorari at 26, Fogerty v. State, 231 Cal. Rptr. 810 (1986) (No. 86-1877), *cert. denied*, 484 U.S. 821 (1987).

18. *See infra* notes 124, 128 and accompanying text for further discussion of this point.

19. John F. Chant et al., *The Economics of the Conserver Society*, *in* ECONOMICS AND THE ENVIRONMENT: A RECONCILIATION 1, 83 (W. Block ed., 1990).

20. Hughes v. Washington, 389 U.S. 290, 298 (1967) (Stewart, J., concurring).

tion of the public trust doctrine can ensure that our water resources will be managed efficiently and in the public's best interest while still meeting the public demand for continued access.

## HISTORY OF PROPERTY RIGHTS AND PUBLIC RIGHTS

The rift between private property rights and public trust theory is not a new one.[21] The Magna Carta, written in 1215 A.D. and recognized as the earliest English charter of individual liberties, "declares that no freeman shall be deprived of his freehold or other fundamental rights except by judgment of his peers and by the law of the land."[22] This deference continued in England during the formative years of our common law and was brought to America with the colonists. As one commentator has noted, "while the British were scoundrels in a thousand ways, they never abused eminent domain."[23]

John Locke believed that natural rights derived from a principled, natural equality among men.[24] Locke believed that governments were formed to protect and preserve "lives, liberties and fortunes,"[25] or in other words, life, liberty, and property. Federalists, such as James Madison, not only embraced Locke's principles but also believed property rights to be "inviolable."[26] According to Madison, government was instituted "no less for the protection of property than of the persons."[27] Madison "attributed the convening of the Constitutional Convention less to the necessity of remedying the deficiencies of the Articles of Confederation than to providing some effective security for private economic rights."[28] At the convention, Madison not only proposed the takings clause as an amend-

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21. *See, e.g.*, Michael Futterman & Clarence B. Nixon III, *The Public Trust After* Lyon *and* Fogerty*: Private Interests and Public Expectations—A New Balance*, 16 U.C. DAVIS L. REV. 631 (1983).

22. Bernard H. Siegan, *The Law and Land*, *in* PRIVATE RIGHTS & PUBLIC LANDS 9 (Phillip N. Truluck ed., 1983).

23. William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 566 (1972).

24. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 122 (Thomas Cook ed., 1947).

25. *Id.* at 191. For a more recent but similar analysis, see Lynch v. Household Finance Co., 405 U.S. 538, 552 (1972), "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other."

*But see* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 911 F.2d 1331, 1338 n.5 (9th Cir. 1990) ("Suffice it to say that even the framers of the fifth amendment saw the wisdom of enumerating life, liberty and property separately, and that few of us would put equal value on the first and third.").

26. PROPERTY, NATIONAL GAZETTE, March 27, 1792, *reprinted in* 14 THE PAPERS OF JAMES MADISON 266, 267 (Robert Rutland & Thomas Mason eds., 1983).

27. THE FEDERALIST No. 54, at 231 (James Madison) (Benjamin F. Wright ed., 1961).

28. Siegan, *supra* note 22, at 11.

ment to the Constitution, but also sought a federal legislative body to represent only property owners.[29] Adam Smith embraced the Madisonian property ethic:

> It is only under the shelter of the civil magistrate that the owner of that valuable property, which is acquired by the labour of many years, or perhaps by many successive generations, can sleep a single night in security. He is at all times surrounded by unknown enemies, whom, though he never provokes, he can never appease, and from whose injustice he can be protected only by the powerful arm of the civil magistrate continually held up to chastise it. The acquisition of valuable and extensive property, therefore, necessarily requires the establishment of civil government.[30]

Thomas Jefferson disagreed with these principles and perceived property as a benefit of privilege. He believed that government served not to protect life, liberty, and property, but instead, "life, liberty and the pursuit of happiness."[31] Under the Jeffersonian view, individuals retained or owned property in trust for the benefit of the whole of society.[32]

The Jeffersonian perspective justifies a highly centralized regulatory means of environmental management. Proponents of centralized controls believe that such control eliminates externalities and by dispersion, lowers transaction costs, thereby preserving communal resources.[33] Centralized controls are appropriate to this way of thinking because the market has failed. The public trust doctrine persists on this basis. "The adoption of the public trust doctrine was predicated on the belief that private ownership of certain resources of a peculiarly public nature, valued for their importance to society, would be inappropriate."[34]

Pigovian economic models are the basis for this socialistic[35] govern-

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29. PROPERTY, NATIONAL GAZETTE, *supra* note 26, at 266-67.

30. DOUGLAS C. NORTH & ROGER LEROY MILLER, THE ECONOMICS OF PUBLIC ISSUES 164 (5th ed. 1980) (citing ADAM SMITH, THE WEALTH OF NATIONS (1776)).

31. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

32. Letter from Thomas Jefferson to James Madison (Oct. 28, 1785), *in* THE PORTABLE JEFFERSON, at 396-97 (M. Peterson ed., 1975).

33. Conversely, "By leading men to sacrifice their dignity for security, freedom for equality, and justice for hypothetical social justice, they are led to ask for more state power. And when men are led to expect everything from the state, they forget how to rely on themselves." Louis Pauwels, *Property Rights and Freedom*, *in* PRIVATE RIGHTS & PUBLIC LANDS, *supra* note 22, at 1, 3.

34. Mark Cheung, *Dockominiums: An Expansion of Riparian Rights That Violates The Public Trust Doctrine*, 16 B.C. ENVTL. AFF. L. REV. 821, 830 (1989).

35. Pauwels identified this socialism as "scientific."

> It calls for the collective appropriation of the means of production and, in the name of class struggle, it claims that state property is the only form of property that leads to absolute justice. However, when we see the direction that our societies are taking and see that freedom is diminishing, we discover that government property is the legal form of robbing

mental intervention.[36] Pigovian models rationalize communal ideals because the costs of externalities are perceived to be evidence of market failure.[37] *Economics*,[38] the dominant college economics text of the 1960s and 1970s, strongly influenced such thinking. That text states:

> Wherever there are externalities, a strong case can be made for supplanting complete individualism by some kind of group action . . . The reader can think of countless. . . . externalities where economics would suggest some limitations on individual freedom in the interest of all.[39]

As students of that generation gained political clout, the interventionist bias manifested and centralized regulatory approaches were readily adopted.

New economic models incorporate the elemental values of property rights and transactional costs.[40] While Pigovian economic theory rationalizes the avoidance of compensation for environmental actions as benefiting the public,[41] newer economic models indicate that such environmental meddling is inappropriate.[42] Communal command-and-control responses are now shown to have much larger costs than previously thought. "[W]hen property rights can be transferred coercively by imposing taxes or regulations, rent-seeking competition becomes far more destructive

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> individuals. If the primary value of a democracy is the respect of individual freedom, we must recognize that the foundation of individual freedom rests in the right to private property. In fact, individual freedom and private property are inseparable. Actually, the right to property is freedom.

Pauwels, *supra* note 33, at 2-3.

36. *See* BURTON, *Epilogue* THE MYTH OF SOCIAL COSTS 87 (Cheung ed., 1978) ("The Pigovian analysis contains an implicit bias toward 'interventionist solutions' for externalities in the form of taxes, subsidies, regulations and prohibitions [because] externalities necessitate 'corrective' government action.").

37. Terry L. Anderson, *The Market Process and Environmental Amenities*, *in* ECONOMICS AND THE ENVIRONMENT: A RECONCILIATION, *supra* note 19, at 137-38.

38. PAUL A. SAMUELSON, ECONOMICS (11th ed. 1980).

39. *Id.* at 450; *see also* Terry Anderson & Donals Leal, Free Market Versus Political Environmentalism, 15 HARV. J.L. 7 PUB. PL'Y, 299-300.

40. *See* R. H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960). This brand of institutional economics is generating a body of literature that is changing the way we think about government and its role in the market system. *See* Anderson, *supra* note 37; *but see* Pierre Schlag, *An Appreciative Comment on Coase's The Problem of Social Cost: a View from the Left*, 1986 WISC. L. Rev. 919.

41. *See* Pennsylvania Cent. Transp. Co. v. City of New York, 438 U.S. 104, 133-34 n.30 (1978) (justifying several earlier holdings "on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit. . . ."); *see also* Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

42. This framework for thinking about the environment has been identified as "New Resource Economics" and was first formally discussed in Terry L. Anderson, *New Resource Economics: Old Ideas and New Applications*, 64 AM. J. AGRIC. ECON. 928, 928-34 (1982). *But see* Joseph Sax, *The Limits of Private Rights in Public Waters*, 19 ENVTL. L. 473 (1989).

than market-bidding competition."[43] It is now believed that communal needs will be best served when "everybody's business is nobody's business."[44]

Constitutional limits necessarily constrain the government's power to redefine the range of interests included in the ownership of property. If uses of private property were subject to unbridled, uncompensated qualification under state police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]."[45]

Expectations are the foundation of our market based society. However, expectations are inherently defeated if we permit the arbitrary shifting of private rights to communal ones. Conversely, if the government were denied the power of eminent domain and the ability to compel some arbitrary shifting of property ownership, the community could suffer at the equally arbitrary whims of private owners and cartels.[46] To resolve this dilemma, the Fifth Amendment states, in part, "[N]or shall private property be taken for public use, without just compensation."[47] Consequently, it is inappropriate for government to continue to allow resource decisions to be made in a fashion devoid of fiscal consideration. When expectations are taken or defeated, compensation is owed.

A theoretical formula for determining when compensation is owed under the Fifth Amendment has not been established,[48] especially when only a portion of the economic benefit of property is taken.[49] "Although no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests."[50] In 1922,

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43. John Baden & Richard L. Stroup, *Natural Resource Scarcity, Entrepreneurship, and the Political Economy of Hope*, *in* ECONOMICS AND THE ENVIRONMENT: A RECONCILIATION, *supra* note 19, at 117, 118.

44. Walter E. Block, *Environmental Problems, Private Property Rights Solutions*, *in* ECONOMICS AND THE ENVIRONMENT: A RECONCILIATION, *supra* note 19, at 281. Adam Smith said much the same thing when he explained, "It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest." ADAM SMITH, THE WEALTH OF NATIONS 183 (1976).

45. Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922).

46. Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. W. L. REV. 239, 259 (1992).

47. U.S. CONST. amend. V.

48. This is qualified by two exceptions that categorically established that compensation is owed: (1) Physical invasion, *see, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); and (2) the denial of all economic benefit, *see Lucas*, 112 S. Ct. 2886 (1992); *see also* Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987); Hodel v. Virginia Surface Mining & Reclamation Ass'n Inc., 452 U.S. 264, 295-96 (1981).

49. *See* Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984).

50. Agins v. City of Tiburon, 447 U.S. 255, 260-61 (1980).

Justice Holmes wrote: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[51]

The determination of a taking is a question of degree.[52] Today, wetlands regulation under section 404 of the Clean Water Act[53] dominates the regulatory takings calendar.[54] Because the wetlands issue is at the forefront of the current environmental agenda, the public trust doctrine has become a source of conflict.[55]

## HISTORY OF THE PUBLIC TRUST DOCTRINE

While the concept of the public trust existed as early as the Roman Empire,[56] the American version of the doctrine[57] evolved from English history.[58] The Roman property system held that coastal shores "cannot be

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51. Pennsylvania v. Mahon, 260 U.S. 393, 415 (1992).

52. *Id.* at 416.

53. Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1344 (1988).

54. *See* most recently Bowles v. United States, No. 303-88L, 1994 WL 102117 (Fed. Cl. March 24, 1994); Ciampitti v. United States, 22 Cl. Ct. 310 (1991); Dufau v. United States, 22 Cl. Ct. 156 (1990); Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153 (1990); Florida Rock Indus., Inc. v. United States, 21 Cl. Ct. 161 (1990), *vacated*, 62 U.S.L.W. 2588 (Fed. Cir. March 10, 1994); Formanek v. United States, 18 Cl. Ct. 785 (1989); Beure-Co. v. United States, 16 Cl. Ct. 42 (1988); Deltona Corp. v. United States, 657 F.2d 1184 (Ct. Cl. 1981); Jentgen v. United States, 657 F.2d 1210 (Ct. Cl. 1981); and Avoyelles Sportsmen's League, Inc. v. Alexander, 511 F. Supp. 278 (W.D. La. 1981), for cases concerning the issue whether the denial of wetland fill or dredging permits constitutes a taking pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344.

55. For an example of the tenuous balance between property rights and the public trust, consider Odom v. Deltona Corp., 341 So. 2d 977 (Fla. 1976), where the Florida Supreme Court held that the Marketable Record Title Act barred the State from claiming public trust ownership of the bed of non-meandered lakes or ponds previously conveyed in U.S. patents and deeds. Only ten years later, however, that same court reasoned that the public trust in sovereign lands was more valuable than private title rights protected under the Marketable Record Title Act. Coastal Petroleum Co. v. American Cyanamid Co., 492 So. 2d 339 (Fla. 1986), *cert. denied*, 107 U.S. 950 (1987).

56. The public trust doctrine is complicated and arcane; its roots go back for millennia. This does not explain why the public trust doctrine is one of the most controversial developments in modern American law, and perhaps the single most controversial development in natural resources law. Wilkinson, *supra* note 15, at 425-26.

57. Michigan and South Carolina are exceptions to this doctrine. Michigan held title to the Great Lakes and Lake St. Clair, but granted title to the beds of all other waterways in the state to the riparian owners. Michigan v. Venice of Am. Land Co., 125 N.W. 770 (Mich. 1910); Lorman v. Benson, 8 Mich. 18 (1860). South Carolina follows the common law which conveys title to the bed of navigable water bodies to the riparian owners and not the state. State *ex rel.* McLeod v. Sloan Constr. Co., 328 S.E.2d 84 (S.C. 1985).

58. The California Supreme Court found that the public trust doctrine existed in Mexican law at the time California was ceded to the United States, and thus held that even private grants pursuant to that law prior to statehood were subject to the public trust.

> Law III of Title XXVIII of Las Siete Partidas, the law in effect while California was a part of Mexico, provided, "The things which belong in common to the creatures of this world are the following, namely, the . . . sea and its shores, for every living creature can use each of these things according as it has need of them. For this reason every man can use the sea and

said to belong to anyone as private property."[59] However, following the demise of the Roman Empire and its formal property system, the public trust doctrine disappeared until it was resurrected in English feudal law.[60]

Sir Matthew Hale, counsel for King Henry VIII after the Crown abandoned the Roman Catholic State, resurrected the ownership of the beds of navigable water bodies as a fictitious presumption.[61] This presumption allowed lands not conveyed to private parties to belong to the Crown. The King thus claimed absolute power over the coastal shores and the right to alienate portions of the coast to the exclusive domain of private subjects.[62]

The Magna Carta, however, restrained King John's power. No longer did his powers include the right to exclude the citizenry from sailing and fishing in coastal waters. Nor did the King retain the power to freely alienate a clear and absolute title to these waters.[63] The Magna Carta bifurcated the English public trust; the King owned the jus privatum title and Parliament owned the jus publicum title.[64] At least one court has recognized the significance of this bifurcation: "Since neither party held all the rights to the shoreland, neither could convey it with free and clear title into private hands."[65] Parliament and the King were in essence tenants-in-common of these trust resources, each possessing a less than exclusive ownership which could still be transferred.

At the time of the Magna Carta, unrestricted public access was not problematic. Neither population pressures nor the technological level of those sharing the fishery were sufficient to jeopardize the water resources. It was more efficient to permit access pursuant to the public trust than to manage the public's access.

The public trust doctrine first appeared in North America in the 1641 *Body of Libertyes*.[66] American colonists, governing themselves with their

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its shore for fishing or for navigation, and for doing everything there which he thinks may be to his advantage." Law VI provided, "Rivers, harbors, and public highways belong to all persons in common . . . ." (Las Siete Partidas, CCH (Spain) (1931) pp. 820-821). The Mexican law originated in 13th century Spain under Alfonso the Wise [citation omitted].

City of Los Angeles v. Venice Peninsula Properties, 644 P.2d 792, 797 n.8 (Cal. 1982).

59. J. INST. 2.1.1-2.1.6, (Thomas C. Sandars trans., 1st Am. ed. 1876).

60. One commentator identifies the English doctrine as "the public trust doctrine that was . . . [an] obscure, unfixed, unclear doctrine of communal rights . . . if normatively sensible at all in its own time and place, of little or no application to our republican form of government." Cohen, *supra* note 46, at 241.

61. A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES, §§ 3.09[3][c], 3.36.5 (1993).

62. Everett Fraser, *Title to the Soil Under Public Waters—A Question of Fact*, 2 MINN. L. REV. 313, 315-322 (1918).

63. Boston Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356, 358 (Mass. 1979).

64. Fraser, *supra* note 62, at 315-322.

65. *Boston Waterfront Dev. Corp.*, 393 N.E.2d at 359.

66. *Id.*

birthright English common law, allowed for unlimited access to fishing and sailing in coastal waters. The colonists adopted an interpretation of the doctrine that rejected valid property rights that the English doctrine had established. The use of the American public trust doctrine to preclude private title transfer first arose in the nineteenth century as an attempt to place natural law restraints on untrustworthy legislatures.[67] Legislative mistrust and the consequent confusion of Lord Hale's[68] jus publicum and jus privatum led to the state retaining title to lands under water in order to preserve the public rights of fishing and navigation.[69] Because the American public trust doctrine is almost entirely judge-made, early environmental lawyers seized upon the trust to justify judicial review of resource decisions.[70] Several commentators have suggested that courts adopted the lofty rhetoric of common ownership too literally and failed to understand that substantial private rights were permitted in the supposed common resource.[71]

The adoption of the American doctrine disrupted the precarious balance the English had established between the King and the Parliament. While the English titles of jus publicum and jus privatum were bifurcated and vested in the separate entities of the Parliament and the King, the American colonists vested the titles in a single governmental entity, the state. Consequently, the balance established under the English system was defeated.

Contemporary courts exacerbate this dilemma by holding that the states hold not a single merged title, but two titles; the state can sell neither title so long as each remains subject to the other. The Oregon Supreme Court in *State ex rel. Thornton v. Hay*[72] used this analysis to establish a public right to use the dry sand upland at Cannon Beach.[73] After *Lucas*, the

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67. See Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892), for an example of judicial rejection of an "inappropriate" legislative act accomplished by an early application of the American public trust doctrine.

68. *See* MATTHEW HALE, DE JURE MARIS, *reprinted in* STUART MOORE, A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO 370, 374 (3d ed. 1888).

69. Patrick Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L.J. 13, 56 (1976).

70. *See generally* Sax, *supra* note 3, at 471.

71. *See, e.g.*, Deveney, *supra* note 69; Glen J. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 FLA. ST. U. L. REV. 511 (1975).

72. 462 P.2d 671 (Or. 1969).

73. *Id.* at 672. This was held not to constitute a taking because:

> While the foreshore is "owned" by the state, and the upland is "owned" by the patentee or record-title holder, neither can be said to "own" the full bundle of rights normally connoted by the term "estate in fee simple".... The rule in this case, based upon custom, is salutary in confirming a public right, and at the same time it takes from no man anything which he has had a legitimate reason to regard as exclusively his.

Oregon courts placed further credence in this limitation. The United States Supreme Court delivered the *Lucas* decision while *Stevens v. Cannon Beach*,[74] another takings decision, was pending before the Oregon Supreme Court. The Oregon court promptly identified the state law limitation established in *Lucas*, and held:

> *State ex rel. Thornton v. Hay*, is an expression of state law that the purportedly taken property interest was not part of plaintiff's estate to begin with. Accordingly, there was no taking within the meaning of the Oregon or United States Constitutions.[75]

This interpretation of the public trust doctrine is not consistent with the doctrine's English evolution. The King always had the capacity to sell the jus privatum title, just as Parliament could market the jus publicum for whatever value could be captured.[76] The English bifurcation served to hinder the sale of either title by reducing its value, but it never prohibited such transfer. As one commentator concluded:

> Certainly the evidence establishes a long tradition of treating navigable waters as commons, but the specific limitations on the transfer and use of submerged lands imposed by the courts represent judicial intervention that cannot be fully justified by history.[77]

A renewed interest in the public trust doctrine should abide by historical accuracy and restore the jus publicum/jus privatum bifurcation.[78]

## THE MODERN PUBLIC TRUST EXPANSION

Today, the public's demands for resource access are far greater than at any other time in history. These demands are no longer consistent with the public access afforded by archaic interpretations of the public trust doctrine. Continued unlimited access is leading to the destruction of an otherwise valuable resource. Despite the inevitability of this course, courts

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*Id.*

74. 835 P.2d 940 (Or. Ct. App. 1992), *cert. denied*, 114 S. Ct. 1332 (1994).

75. *Stevens*, 835 P.2d at 942.

76. *See* Fraser, *supra* note 62, at 318.

77. Deveney, *supra* note 69, at 13.

78. Even those states that rejected the "English rule" and adopted the navigable in fact test to determine title, did so under the mis-apprehension that Hale's presumption was a rule of law and that to adopt his system (of jus publicum/jus privatum) would be to abdicate title, and hence the public right of navigation, in the great non-tidal rivers of America. The jus publicum, the public right, was thus transformed from an open-ended set of uses over navigable waters protected by the police power of the state into a species of quasi-property which the state must maintain to preserve navigation. *Id.* at 54.

continue to expand the public trust doctrine.[79] Ironically, therefore, public resource detriment occurs at the expense of private rights.[80]

The modern story of the public trust's[81] judicial activism is one of vast expansion on two fronts. Such expansion reveals that the doctrine can be responsive to new resource demands and political pressures, but that courts are proceeding down an unwise course. The first expansive front pertains to those interests protected under the public trust. The second pertains to those "waters" where the public trust doctrine is deemed applicable.

### JUDICIAL EXPANSION OF PUBLIC TRUST INTERESTS

The cornerstone application of the modern public trust doctrine was established in *Illinois Central Railroad v. Illinois*.[82] In that case, the United States Supreme Court held that the doctrine created "a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties."[83] This triad of traditional interests, fishing, boating, and commerce, has since been judicially expanded.[84] No longer are the public trust interests limited to the ancient prerogatives of navigation and fishing, but now they extend as well to recreational swimming, bathing, and other beachfront activities.[85] As one author concluded, "for some jurisdictions, public trust rights apparently are open-ended."[86]

A novel expansion of the traditional public trust interests occurred in 1983 when the California Supreme Court added ecological values to the

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79. *See* Ted J. Hannig, Note, *The Public Trust Doctrine Expansion and Integration: A Proposed Balancing Test*, 23 SANTA CLARA L. REV. 211 (1983); Janice Laurence, *Note*, Lyon *and* Fogerty: *Unprecedented Extensions of Public Trust*, 70 CALIF. L. REV. 1138 (1982).

80. *See, e.g.*, State v. Sorenson, 436 N.W.2d 358, 363 (Iowa 1989) (rejecting an argument that accreted lands adjacent to the Missouri River were not subject to the public trust because they were not necessary for navigation or commerce). After the court took judicial notice "of the expanding involvement of Iowans in recreational activities on and near navigable streams such as the Missouri River," the court held, "The land in question here is undoubtedly suited for use as public access to the river . . ." and thus, was held subject to the public trust. *Id.*

*See also* Note, *Constitutional Right to Fish: A New Theory of Access to the Waterfront*, 16 U.C. DAVIS L. REV. 661 (1983); Allan Robert Berrey, Note, *Public Access to Lands Annually Flooded: A Constitutional Analysis of Section 2016 of the California Fish and Game Code*, 16 PAC. L.J. 353 (1984).

81. Cohen, *supra* note 46, at 241 (describing this modern American doctrine as the doctrine "that is . . . a jumbled and evolving body of case law and commentary . . . bear[ing] only a tangential relation to its antecedents . . . far less clear as to content, radically changed in focus, and enormously enlarged in scope").

82. 146 U.S. 387 (1892).

83. *Illinois Cent. R.R.*, 146 U.S. at 452.

84. Borough of Neptune City v. Borough of Avon by the Sea, 294 A.2d 47, 54 (N.J. 1972).

85. *Id.*

86. JOSEPH J. KALO, COASTAL AND OCEAN LAW 119 (1990).

protected trust interests. In *National Audubon Society v. Superior Court of Alpine County*,[87] the court held that "the scenic views of [Mono Lake] and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds" must be considered before any appropriative water grants could be upheld.[88] The court further held that the state had an affirmative duty "to protect the people's common heritage of streams, lakes, marshlands and tidelands . . . ."[89] When the Water Board deeded the subject water grants from Mono Lake tributaries to Los Angeles in 1940, those interests were not within the rubric of the public trust. Nevertheless, the court expanded the trust to encompass them. Because the Water Board had not protected these interests decades earlier, the court rescinded the water grants.[90] The court considered public trust interests more significant than private property rights conveyed to Los Angeles by the grant deeds.

Similarly, the New Jersey Supreme Court found that health, recreation, and sports were intimately related to the general welfare of a well-balanced state.[91] Despite private titles, the Court expanded the public trust doctrine because it protected those interests.[92]

### JUDICIAL EXPANSION OF PUBLIC TRUST WATERS

While the interests protected by the trust have judicially expanded, courts have also expanded the types of waters to which the trust applies.[93] Until 1851, American courts refused federal admiralty jurisdiction except on waters where the tide ebbed and flowed.[94] Then in 1851, the federal court granted admiralty jurisdiction to the non-tidal, but navigable, Great

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87. 658 P.2d 709, 719 (Cal. 1983).

88. *National Audubon Soc'y*, 658 P.2d at 719.

89. *Id.* at 720.

90. But see Lake Shore Duck Club v. Lake View Duck Club, 166 P. 309, 310-11 (Utah 1917), for an early opinion that did not involve navigable waters or the public trust doctrine, but that rejected the public environmental benefits of instream water reservations by comparing them to valid private water rights:

> [It is] utterly inconceivable that a valid appropriation of water can be made under the laws of this state, when the beneficial use of which, after the appropriation is made, will belong equally to every human being who seeks to enjoy it . . . . [W]e are decidedly of the opinion that the beneficial use contemplated in making the appropriation must be one that inures to the exclusive benefit of the appropriator and subject to his domain and control.

91. Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 363 (N.J. 1984).

92. *Id.*

93. *See* Scott W. Reed, *The Public Trust Doctrine: Is It Amphibious?*, 1 J. ENVTL. LAW & LITIG. 107, 107 (1986). While the application of the public trust has been extended and the doctrine has "evolved into an amphibian, moving easily from the waters onto shorelands," dry sand beaches, and inland lakes and streams, it is not likely that the same doctrine can "shed its fins, scales and the webbed feet to climb upland to the forests and mountains." *Id.*

94. Richard W. Bartke, *The Navigation Servitude and Just Compensation—Struggle for a Doctrine*, 48 OR. L. REV. 1, 8 n.34 (1968).

Lakes.[95]

> The jurisdiction is here [in the Judiciary Act of 1789] made to depend upon the navigable character of the water, and not upon the ebb and flow of the tide. If the water was navigable it was deemed to be public; and if public, was regarded as within the legitimate scope of the admiralty jurisdiction conferred by the Constitution.[96]

As this jurisdiction expanded, so too did the applicability of the public trust.

In 1981, the California Supreme Court established that the public trust turned upon navigability rather than on tidal influence.[97] Later, in *National Audubon Society*, the California Supreme Court adopted a harmful nexus standard to bring the non-navigable tributaries of navigable waters under the umbrella of public trust protection.[98] The harms that the National Audubon Society sought to enjoin occurred in the navigable lake body; however, the city was taking water from non-navigable tributaries.

Various state courts have expanded the interpretation of public trust waters.[99] In New Jersey, for example, the trust applies to the beaches and dry uplands abutting public trust waters.[100] New Jersey cases have allowed the public to utilize municipally owned lands. In *Matthews v. Bay Head Improvement Ass'n*, the court was willing to go much further in recognizing the increased recreational demands of today's society:

> Today, recognizing the increasing demands for our State's beaches and the dynamic nature of the public trust doctrine, we find that the public must be given both access to and use of privately-owned dry sand areas as reasonably necessary.[101]

The court refrained from determining what was "reasonable."[102] Although it did not use the term taking, the court expressed no qualms about taking private property under the guise of the public trust.[103] Similarly, the

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95. Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 451-58 (1851).

96. *Id.* at 457.

97. State v. Superior Court of Lake County (*Lyon*), 625 P.2d 239 (Cal. 1981), *cert. denied*, 454 U.S. 865 (1981); State v. Superior Court of Placer County (*Fogerty*), 625 P.2d 256 (Cal. 1981), *cert. denied*, 454 U.S. 865 (1981). Whether this expansion constitutes a taking for which compensation is owed remains undecided. *See supra* note 17.

98. *National Audubon Soc'y*, 658 P.2d at 720-21.

99. *See* Reed, *supra* note 93, at 107.

100. *Matthews*, 471 A.2d at 364-66.

101. *Id.* at 365.

102. *Id.*

103. *Id.* at 365-366; *but see* Bott v. Natural Resources Comm'n, 327 N.W.2d 838 (Mich. 1982). The court expressed concern for property owners who had purchased properties hoping that the private character of the adjacent waters would significantly add to their value. This case drew a distinction

Oregon Supreme Court allowed the public to retain title to the sandy upland at Cannon Beach.[104]

Perhaps the most creative expansion of public trust application occurred in 1988. In *Phillips Petroleum Co. v. Mississippi*,[105] the Court concluded that the public trust doctrine was dispositive. Although the state recognized the validity of the private title, the United States Supreme Court held that the public trust precluded any alleged title grants, and awarded the parcels in question to Mississippi.[106] Dissenting Justice O'Connor, joined by Justices Stevens and Scalia, noted, "Although Mississippi collected taxes on the land and made no mention of its claim for over 150 years, the Mississippi Supreme Court held that Mississippi was not estopped from dispossessing petitioners."[107] The Court extended the doctrine to apply it to the parcels at issue. Therefore, the Court reexamined the historic tidal character test. The Court explained that although the parcels are "several miles north of the Mississippi Gulf Coast and are not navigable, they are nonetheless influenced by the tide, because they are adjacent and tributary to [a stretch of] the Jourdan River, [which is also affected by the tide and is] a navigable stream flowing into the Gulf."[108] The Court redefined the traditional factor of tidal influence to include adjacency through a tributary nexus.

## NON-COMPENSATED TAKINGS

Though judicial expansions clearly infringe upon long recognized property rights, courts have utilized an abundance of legal devices to circumvent the Fifth Amendment requirement of compensation for takings. In two 1984 cases, the Montana Supreme Court determined what uses to permit in public trust waters, but refrained from determining the proper titles of the beds.[109] Therefore, the court reasoned that a takings claim could not be properly raised.[110] Other courts have avoided the takings issue by invoking dedication[111] and custom.[112]

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between traditional public trust rights and newly asserted recreational rights that would unacceptably extend the trust at the expense of private owners' expectations. *Id.*

104. State *ex rel.* Thornton v. Hay, 462 P.2d 671, 673 (Or. 1969). *See also supra* note 2 for the more recent ramifications of this decision.

105. 484 U.S. 469, 484-85 (1988).

106. *Phillips Petroleum*, 484 U.S. at 484-85.

107. *Id.* at 494.

108. *Id.* at 472.

109. Montana Coalition for Stream Access v. Curran, 682 P.2d 163, 171 (Mont. 1984); Montana Coalition for Stream Access v. Hildreth, 684 P.2d 1088, 1093 (Mont. 1984).

110. *Curran*, 682 P.2d at 171; *Hildreth*, 684 P.2d at 1093. *But see*, Galt v. Montana Department of Fish, Wildlife and Parks, 731 P.2d 912 (Mont. 1987) (holding that the statutory grant of certain uses on private land incident to public trust waters was not constitutional).

111. County of Los Angeles v. Berk, 605 P.2d 381 (Cal. 1980); Gion v. City of Santa Cruz, 465

In *Phillips Petroleum*, after extending the public trust doctrine's scope to encompass the parcels in question, the Court held that the trust itself precluded any valid private title deeds.[113] The Court reasoned that the state lacked the authority to transfer private title while maintaining a trust over the jus publicum sovereignty power, and therefore, the title could not be properly transferred to any private party.[114] Thus, the deed was invalidated. Without a valid deed, the Court concluded there could be no takings claim.[115] The implication of this analysis provides in the wake of *Lucas* a vast power for states to take private property without compensation.

What remains is a paradox: the jus publicum title exists, preventing the state from transferring its jus privatum title, yet no one explicitly owns this title. The jus publicum should be abdicated in favor of a market system, thereby freeing the state to transfer the jus privatum title as it sees fit, and ultimately privatizing the public trust.

## PUBLIC ACCESS, AT WHAT COST?

When courts expand the public trust doctrine for perceived public benefit, they harm the water resource in several fashions. By unsettling owner's expectations, water resources are no longer viewed as covetable assets. By affecting the alienability of public trust parcels, owners are discouraged from fostering management practices which otherwise would be rewarded. Because it is difficult to appraise and then market shifting property interests, the uncertainty caused by the public trust hinders alienability. Because such property is thus without any value, an owner is discouraged from investing money to foster the resource. Nevertheless, the public trust persists to affect even lawful and statutory deeds.

Riparian deeds often represent title claims to the low water mark. Montana has codified this general deed provision.[116] Nevertheless, many state courts construe this provision subject to public trust interests. In Montana, such deeds are subject to the angling statute, which recognizes a public right to fishing access up to the high water mark of navigable streams.[117]

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P.2d 50 (Cal. 1970).

112. State *ex rel.* Thornton Voltey, 462 P.2d 676-77 (Or. 1969).

113. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 485 (1988).

114. *Id.*

115. *Id.* This analysis closely mirrors that used by the California Court in *National Audubon Soc'y*. *See supra* notes 88 and 98 and accompanying text.

116. MONT. CODE ANN. § 70-16-201 (1993).

117. Montana Coalition for Stream Access v. Curran, 682 P.2d 163, 172 (Mont. 1984); *but see*, Galt v. Montana Department of Fish, Wildlife and Parks, 731 P.2d 912 (Mont. 1987). *See* MONT. CODE ANN. § 87-2-305 (1993).

Constitutionally protected private property rights should prevail over statutory interests.[118] The uncertainties of riparian deeds and clouded legal rights hinder alienability. Such uncertainties regarding title hinder the buyer's willingness to invest in shorefront properties. As identified by dissenting Justice Braucher after a Massachusetts Court invalidated private title to wharf space on Boston Harbor:

> The present decision leaves in limbo the ownership of the particular tract in litigation. The resulting uncertainty as to that tract may not be a matter of grave public concern, but we are told that there will be a similar mischievous effect on uncounted other parcels. In time, the uncertainty may be alleviated by a broad interpretation of what uses are consistent with the "public purpose" embodied in the condition . . . . Meanwhile, however, the present decision creates a clog on the alienability of land contrary to a public policy that has prevailed for centuries.[119]

Obstruction to alienability leaves little incentive for private landowners to maximize the value of the resource in question. The instability of a return on a resource investment leads to a reluctance to invest and ultimately hinders the resource wealth of the property. If the buyer is fearful of even retaining his investment value, the reluctance is even greater.

While the United States Supreme Court has traditionally recognized the importance of honoring reasonable investment-backed expectations and investments in property interests, "such expectations can only be of consequence where they are 'reasonable' ones."[120] In *Phillips Petroleum*, though acknowledged to be a case of first impression, the Court held that

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118. While some commentators, notably Mr. Sax, argue that the public trust doctrine is itself constitutionally based, there is little evidence to support this. Of the triad of traditional interests, the commerce interest is vested within the Commerce Clause; navigation is sheltered by admiralty jurisdiction, navigation servitudes, and the Commerce Clause. There is no federal provision affording a right to fish, though some state constitutions do recognize this interest (e.g., Vermont Constitution, Chapter II, § 67 "The inhabitants of this State shall have liberty in seasonal times . . . to fish in all boatable and other waters (not private property)." Were the trust doctrine constitutional, there would be no need for duplicity of interest protections. As for basing the public trust doctrine within state constitutions, it would be inconsistent with the federal constitution, and thus improper, to alter vested property rights. Also, while every state constitution contains a compensation provision of some form, and most mirror the Fifth Amendment, "[t]he constitutions of twenty-three states are broader . . . in that they require compensation when private property is either taken or damaged for public use." John N. Fulham & Stephen Scharf, *Inverse Condemnation: Its Availability in Challenging of a Zoning Ordinance*, 26 STAN. L. REV. 1439, 1440 n.3 (1974). *See also* Michael C. Blumm, *Property Myths, Judicial Activism, and the* Lucas *Case*, 23 ENVTL. L. 907 (1993) (distinguishing property rights and development rights).

119. Boston Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356, 370 (Mass. 1979) (Braucher, J., dissenting).

120. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 482 (1988).

the owners' investment-backed expectations were unreasonable and therefore uncompensable. The Court then held that earlier state court holdings were ample precursors of faulty title because of the established public trust.[121] In the dissent, Justice O'Connor, joined by Justices Stevens and Scalia, stated that the case involved more than "cold legal doctrine" and expressed the sentiment that the majority decision would disrupt the settled expectations of landowners nationwide.[122]

If public trust properties are subjected to doubt and clouded titles, any investment in them is legally unreasonable. Consequently, the incentive to invest in riparian resources is removed. Ironically, judicial interpretation sends the message that properties subject to the public trust are not covetable assets to be managed efficiently, but instead are liabilities.

While clearly recognizable and enforceable property rights would provide security and incentives for the owner to invest in and foster the water resources, uncertainty and public access transform the asset into a liability and destroy this incentive. Any public trust analysis providing for unlimited public access consequently results in the owner's perception of the resource as a liability.[123]

If recognized property rights are held subject to a predating public easement, the owner is denied perhaps the most important property right, exclusivity. Without this right, the public is allowed access with little, or more likely, no control. Such access, through the tragedy of the commons, will ultimately harm the very resource which the trust is to serve. Even if the public's consumptive usage never causes resource depletion, the mere existence of this public right is a private liability for the owner.

Perhaps the greatest drawback to this type of analysis is that any supposed easement is not sufficiently defined. If an easement is defined for a limited number of identifiable persons so that transaction costs are low, the Coase Theorem[124] tells us that efficient resource allocation will ensue regardless of which party, recreationist or landowner, owns the easement. With the easement assigned to the general public, however, the transaction costs are significantly higher so that efficient resource allocations become problematic.

Property is particularly attractive for application of the Coase Theorem because the bundle of rights can be individually partitioned without being diluted. One person may have the right to exclude, while another may retain a right of entry. Such flexibility suits both parties and

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121. *Id.* at 482.

122. *Id.* at 492-93.

123. *See* James Huffman, *A Fish Out Of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527 (1989).

124. *See* Coase, *supra* note 40.

allows both to determine the appropriate values for each property right. An easement between neighbors is a classic, easily understood example of two owners holding separate sticks from the same property bundle. If an easement is granted to the general public, however, the example is no longer so simple. Because the user group is no longer readily identified, the owner's transaction costs are uncertain.

Further, if the public demand is sufficiently large to require an easement, then the most efficient fashion of identifying a transaction cost is to require the state to purchase the parcel from a public market pursuant to eminent domain. The government may take property to satisfy public wants, provided just compensation is paid. Consistent with the Coase Theorem, the Fifth Amendment requires that just transaction costs be ascertained and efficiently distributed among those whose demand has been satisfied, in this case, the public.

While equating the public trust with an easement recognizes the validity of private rights, it is not conducive to efficient resource management. Though the bifurcated jus publicum/jus privatum system created an acceptable commons system given the limited resource pressures of feudal times, society's resource demands have changed. A commons is no longer efficient, and an easement is not appropriate. As courts have recognized the growth of recreational needs and responded with public trust expansion, now is the time to respond to new social and environmental pressures and curtail the trust's usage.[125]

Public access alone is sufficient to harm the public trust resource. Pennsylvania's Bushkill Creek flows through a single privately owned parcel in Northampton County. This creek's history offers a unique understanding of the relationship between the control of public access and resource wealth. In 1977, the creek's owner, wanting to allow continued access but only in a regulated fashion, removed the creek from the state's general fishery regulations and placed it instead within the Wild Trout Program. Significantly, the creel limit was established to be one fish over twenty inches. Under these regulations, by 1981 the trout population had jumped from twenty-two to seventy-seven pounds per acre, even though stocking was discontinued. The "[f]ishing was excellent."[126]

The fishing became so good in fact, that a few "anglers" opposed to

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125. "Far from being a modern invention of goal-oriented judges, change is the unchanging chronicle of water jurisprudence .... New needs have always generated new doctrines and, thereby, new property rights." Joseph L. Sax, *The Constitution, Property Rights, and the Future of Water Law*, 61 U. COLO. L. REV. 257, 268-69 (1990). "The problem is really quite simple; it does not require mastery of abstruse legal doctrines to appreciate what is going on. The heart of the matter is that public values have changed, and the use of water has reached some critical limits." Sax, *supra* note 41, at 474.

126. Joe Reynolds, *Catch and Release: A No Lose Proposition*, FIELD AND STREAM, July 1991, at 53.

catch and release and strictly regulated access pressured the landowner to again open the creek to general fishing. Their pressure culminated in threatened arson against the owner's house. In response to these threats, and because the state already had tremendous amounts of strictly controlled water,[127] the creek reverted to general regulations in 1982. "Our 1983 survey was astonishing—in a single year nearly two-thirds of the trout population had been eliminated. All of the age four and five browns [trout] had been killed; fish in the 18 to 28 inch class. I didn't think it would have been possible in one year."[128]

Even if public access does not deplete the resource to the extent it did on Bushkill Creek, public access is a liability which reduces the owner's incentive for good resource stewardship. If the public is allowed unlimited access, the owner is exposed to the costs associated with open gates, rutted roads, pollution, noise, and even civil liability.

Such costs are not merely hypothetical, but have been identified and recognized. The Washington Supreme Court found that following the installation of a public access ramp on a lake previously closed to the public, the riparian owners were subjected to the following harms:

> 1. The fair market value of plaintiff's property has been decreased.
> 2. Thievery on the lake has greatly increased, particularly the stealing of boats, oars, outdoor furniture, tools and miscellaneous items of personal property of all kinds. In many of the cases it was definitely ascertained that the thieves gained access to the lake from the public access area.
> 3. Persons relieving themselves in the lake as well as on the property and front yards of various of the plaintiffs, to the considerable embarrassment and annoyance of the plaintiffs, their families and guests.
> 4. Beer cans, worm cans, sandwich bags, pop bottles, rafts, and other assorted trash has been deposited in the lake and on the plaintiff's beaches in considerable quantity.
> 5. Repeated and frequent trespasses on the plaintiffs' front yards, docks, beaches and property. In addition to the trespasses by persons coming in by the access area, numerous other trespassers have crossed the plaintiff's yards, docks, beaches and property from other adjoining residential areas, and which trespassers, when confronted by the plaintiffs, have justified their actions by saying to the effect that, 'Well, now, it's a public lake isn't it.'

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127. Pennsylvania has more specially regulated waters, such as Spring Creek and Yellow Breeches, than any state in the Northeast. *Id.*

128. Reynolds, *supra* note 126, at 53.

> 6. Numerous of the plaintiffs, their children and grandchildren, have severely and frequently been cut by broken beer bottles left on the beaches.
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> 7. Fishermen using plaintiffs' docks, and fishing immediately adjacent to their beaches and front yards, would refuse to leave when requested and would stare and make remarks when plaintiffs, their wives and daughters would try to use their beaches for sun bathing, swimming, or the entertainment of guests. The plaintiffs, as a result of this, cut down very considerably in their use of their front yards and beaches.
>
> 8. Although hunting and shooting on the lake are illegal, hunters come in and shoot on the lake. Persons also come in and shoot at ducks with air rifles.
>
> 9. Speed boating on the lake has greatly increased. In some cases it has increased to the extent that it has become a danger to the plaintiffs' children.
>
> 10. The public use of the lake has interfered with the plaintiffs' use of the lake for boating, swimming, fishing, and recreational purposes.
>
> 11. The noise on the lake has substantially increased.[129]

While many of these harms are enjoinable nuisances or civil violations, the state's enforcement cost is too great to warrant effective intervention. In fact, after the state of Washington was unable to reach an agreement with the riparian owners, the state determined that it could not afford the court required regulation of public access.[130] The state allowed the lake to revert to private usage and closed public access.

A riparian owner whose property is subject to public use under the public trust doctrine could not similarly deny public access. Nonetheless, the private owner has the same strong incentives to avoid these costs and harms. Ironically, since allowing the resource to be degraded will reduce the public's demand, the owner who bears these harms has a perverse incentive to allow and even encourage the resource's degradation. The destruction of the resources for which public access has been sought is the true irony of the current misguided public trust analysis. Put succinctly, fishing access, if there are no fish, is valueless.

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129. Botton v. State, 420 P.2d 352, 353-54 (Wash. 1966) (quoting the trial court's findings of fact).

130. Additionally, the state feared that if such precedent were allowed to stand and a guard were hired, then there would be an outcry from riparian owners of every other lake with a public access to be patrolled, a cost the state could not bear. *See* JOSEPH L. SAX & ROBERT H. ABRAMS, LEGAL CONTROL OF WATER RESOURCES 140 n.1 (1986).

## PRIVATIZATION OF THE PUBLIC TRUST

This article has stated the need to prevent courts from circumventing the constitutional takings issue. Those who espouse the public trust doctrine as a means of avoiding this communal obligation seek to take valuable property resources for the public without the provision of compensation. Such social free-riding occurs whenever persons benefit from transactions to which they do not contribute costs. Each of us inherently desires to obtain something for nothing.

However, our market system ensures that consumers make informed choices which are inspired by economic incentives. While each of us would like to compel ecological sanctity without cost, new economic models are disclosing previously unseen costs. When the public is made aware of these real costs, perhaps those advocating continued expansion of the public trust shall be properly exposed as social free-riders. This article measures change not solely by good intentions, but by the measurable and constitutional costs of implementation.

The problem of these communal free-riders is easily rectified by properly recognizing the jus privatum title. Vested in private fee, historically this title is enforceable and transferrable. Even in *Illinois Central Railroad v. Illinois*, the United States Supreme Court recognized that at least to a limited extent, this title remained transferable:

> It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters . . . .[131]

The jus privatum title should require compensation when property is taken. In this fashion, our communities can be assured that those environmental goods that are in demand can be obtained, while increasing social wealth. "[T]he will of the majority is, from a social wealth perspective, quite different from the general interest."[132]

By subjecting public trust resources to market pressures, we can guarantee that our resources will most efficiently maximize social wealth. Such market function is possible only with clearly defined property rights. Even with such private property rights, continued public access is ensured. This conclusion is supported by the new resource economics reshaping this debate.

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131. 146 U.S. 387, 435 (1892).

132. Cohen, *supra* note 46, at 262.

> Only when rights are well defined, enforced and transferrable will self-interested individuals confront the trade-offs inherent in a world of scarcity. As entrepreneurs move to fill profit niches, prices will reflect the values we place on resources and the environment.[133]

So long as the public's demand for resource access creates a niche, market theory indicates it will be filled. Though some environmentalists balk at capitalizing our environmental priorities, such shifting of incentives will ultimately result in better resource management. While the private ownership of resources is often mistakenly criticized for leading to "rape and pillage" behavior, this attitude assumes that private owners desire to exhaust a resource as quickly as possible. New analysis discloses that such a belief is unfounded.[134]

Only if the resource is more valuable today than it will be in the future do rational notions of efficiency indicate that a hurried harvest is best. Efficiency otherwise dictates that the resource be preserved. Those forces opposing privatization reveal that the issue is one of identifying comparative values.

If a resource is expected to become more valuable over time, perhaps in response to resource scarcity, owners interested in increasing their wealth will preserve the resource for the future, even if the resource owner does not expect to live to see the resource finally utilized.[135] If we are sincere in the desire to serve the general interest, we should direct our efforts to allowing resources to accurately reflect their highest value.

The greatest means of advancing social wealth is to require those who "mismanage" these resources (from the public's perspective) to directly bear the consequential costs, while rewarding those who satiate the public's demands. The market, when it functions without obstruction, explicitly functions to define values and favorably manage resources. In a fiscally neutral environment, market forces require individuals to determine whether the potential surplus value realized through the holding of assets is outweighed by other considerations.[136]

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133. TERRY L. ANDERSON & DONALD R. LEAL, FREE MARKET ENVIRONMENTALISM 22 (1991).

134. For example, Terry Anderson and Donald Leal's discussion about whether the Great Lakes old growth pine timberlands were wasted in terms of aesthetic or environmental values that are not included in commodity considerations in the nineteenth century. They conclude, "When judged against prudent investment criteria, nineteenth-century timber markets were efficient. Even if non-market, non-commodity values are included in the calculations, it is not clear that markets incorrectly accounted for these values." *Id.* at 47.

135. *See* Michael D. Copeland, *The New Resource Economics*, *in* THE YELLOWSTONE PRIMER 13, 23 (John A. Baden & Donald Leal eds., 1987).

136. *See* Berry Bracewell-Milnes, *Land and Heritage: The Public Interest in Personal Ownership*, 93 HOBART PAPER 29 (1981).

The most accurate judge of value is the individual negotiating within a market. So long as an item or objective is valuable to an individual, it has value, even though others disparage that item or objective. While there is no guarantee that the market will ultimately provide pristine environmental quality,[137] it must be remembered that even the public trust doctrine's expansive applications provide no environmental guarantees. The privatized market will assure that our environmental quality reflects that which the public both demands and is willing to afford.

It must be bittersweet for those advocates of the public trust to recall that in *National Audubon Society*, the court stated that while environmental resources require protection today, tomorrow they may be subjected to still a greater public good.[138] There is no denying that environmental values are a function of both wealth and time.[139] Environmentalists who are honest historians would be surprised to discover the current status of the public trust doctrine.[140] For example, the United States Supreme Court once held that the dredging and filling of waterbodies for urban expansion constituted efficient resource utilization and was warranted under the public trust.[141]

By recognizing clearly defined property rights and fostering a market system, our natural resources are best valued and can be efficiently managed. While there is little precedent in America for such privatization of natural resources, several examples indicate that this is more than idle theory.

In the Yellowstone River Valley south of Livingston, Montana, privately owned spring-fed creeks provide a world class angling experience to the public. As these streams originate and end on private property, owners can regulate access and charge fees. Often, these creeks require reservations and may be booked weeks or even months ahead. High prices create strong incentives for the owner to maintain a high quality fishing environment by protecting the stream banks from overgrazing and limiting

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137. In fact, the market will assure that some level of resource harm remains because the public will always demand certain goods, the production or consumption of which requires that harms occur. It is highly unlikely that anyone will be able to pay the costs of restoring a pristine environment, even if such restoration were technologically possible.

138. National Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 719 (Cal. 1983).

139. *See* Cohen, *supra* note 46, at 254. "As the United States has grown both in population and in economic size, wealth, and productivity, two economic forces have combined to bring about a change in our relative demand for 'environmental' goods." *Id.*

140. "Perhaps the most obvious cause of surprise is that in its pre-20th century form, the public trust doctrine was not only not an environmentalist principle, but more nearly its opposite." *Id.*

141. Hardin v. Jordan, 140 U.S. 371, 381-82 (1891); Den v. Jersey Co., 56 U.S. (15 How.) 426, 432 (1854).

fishing pressures.[142]

Pardee Reservoir in northern California, like countless other reservoirs in the state, is operated by a municipal utility district for drinking water storage. By charging a nominal daily fee in addition to a $2.50 daily fishing fee, the district is able to provide affordable public recreational access for fishing and boating which is of higher quality than the nearby recreational access that is free. Because lakes which are freely available in the same vicinity receive lesser management, the quality and quantity of the catch is low. In contrast, at Pardee, ten-pound trout, trophies in any class of waters, are not uncommon. Because the fishing fees collected are then reinvested in the resource, the paying public benefits. Similar opportunity exists even in the urban environment of San Francisco, where modest fee access allows for the management of a trophy fishery in the North Lake and a fishery managed to produce high numbers of fish exists in the South Lake at Lake Merced. Few locales afford urban children the opportunity to catch trophy trout on a year-round basis.

Were more waters privatized and made available for such regulated activities, those opportunities would expand. As the opportunities began to compete against one another, the costs would come down even further. Conversely, if the public trust doctrine is interpreted to preclude the private right of exclusion, no fees may be collected and the resources will suffer from overuse and the lack of investment and management.

England and Scotland have long recognized the private ownership of fishing rights in non-tidal waters.[143] There, owners of stretches or "beats" of the rivers may set their own angling rules and charge access fees. Such fees range broadly from £1 or less a day for bait fishing to £100 for a day of guided fly fishing.[144] Because these rights are clearly established, in response to increasing public fishing pressure, there has been a recent proliferation of such privately managed fisheries. As one commentator has noted, "There are few landowners . . . who can afford to ignore the commercial aspect of the sporting rights which they own."[145] Consequently, fishing is now widely available in England at prices which are affordable to the public.

This fee potential provides land owners with incentive to maintain and even better the resource. "Beat managers in England and Scotland regularly cut weeds when appropriate, protect the banks from cattle, and

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142. Anderson & Leal, *supra* note 133, at 109.

143. *Id.*

144. Jane S. Shaw & Richard L. Stroup, *Gone Fishin': Britain's Streams are Lovely, Clear and Deep and Private*, REASON, Aug.-Sept. 1988, at 34, 36.

145. DOUGLAS SUTHERLAND, THE LANDOWNERS 110 (1968).

limit the number of anglers."[146] These managers also initiate suits to enjoin pollution or to collect damages for environmental harms. The fees serve as incentive to provide attractive recreational venues, while the competition for fee-paying anglers requires owners to offer the services and quality which the public wants at a price it is willing to pay.[147] These incentives will not function without enforceable property rights, most notably the power of exclusion.

Given privatization, economic incentives exist even for commercial resource harvesters unconcerned with the public's recreational access. Because in Mississippi, an oyster is not property until harvested, oystermen harvest their oysters from public beds early in the season when the stock is most vulnerable. Conversely, in Louisiana, fishermen own property leases which allow them the right of exclusion. Thus, even unharvested oysters are perceived as property. Because the early season harvest severely pressures the resource stock, Mississippi oystermen make less money than Louisiana's oystermen who thrive on the private lease system.[148] Louisiana's oystermen earn $3,207 a season whereas those in Mississippi only earn $807 after placing a greater strain on the sustainability of the resource.[149]

Oystermen are also subject to the public trust. In fact, one of this nation's first public trust cases regarded oystermen in New Jersey.[150] Mr. Arnold, the plaintiff, owned property bordering a navigable river where he and his predecessors sowed oyster beds within staked plots that did not interfere with navigation. Mr. Arnold claimed lawful and exclusive title to his beds under deeds dating to an original grant from Charles II to the Duke of York. Consequently, when Mr. Mundy, the defendant, harvested Mr. Arnold's oysters, Mr. Arnold sued him in trespass.

The New Jersey Supreme Court held that while title to non-navigable streambeds could be privately conveyed, title to navigable streambeds could not.[151] Because the streambed claimed by Mr. Arnold was sovereignly held in the public trust, the court held Mr. Arnold could retain no greater property interest than any other person, including Mr Mundy. Therefore, the claim for trespass could not lie.[152]

In 1913, the United States Supreme Court again considered the public trust as it pertained to oyster beds. In *Lewis Blue Point Oyster*

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146. Shaw & Stroup, *supra* note 144, at 35.

147. *Id.* at 36.

148. Richard J. Agnello & Lawrence P. Donnelly, *Prices and Property Rights in the Fisheries*, 42 S. ECON. J. 253, 262 (1979).

149. *Id.*

150. Arnold v. Mundy, 6 N.J.L. 1 (1821).

151. *Id.*

152. *Id.*

*Cultivation Co. v. Briggs,*[153] the United States Supreme Court concluded that no compensation was owed for the taking or incidental destruction of private oyster beds in Great South Bay, New York. The Court denied compensation even though the private title pre-dated statehood because the federal navigational interest pursuant to the public trust was superior.[154]

Nearly a century later, the public trust's application to private oyster beds remains controversial. Says Robert Engle, Chairman of the Florida Aquacultural Advisory Council, "There's a group within the Department of Natural Resources (DNR) that has a problem with the use of submerged state lands for the private culture of clams or oysters and they have thrown up roadblocks."[155] In fighting these DNR roadblocks, oysterman Grady Levins spent $80,000 in legal bills defending his property rights to a fifty-five acre oyster bed lease. He claimed others have spent up to a quarter-million dollars.[156]

Levins is one of a half-dozen oystermen who years ago received "perpetual" oyster leases to the bed and the bottom six inches of the water column in Apalachicola Bay, Florida. Since an oysterman spends a great deal of time and money developing a profitable oyster lease, long term holdings are far more desirable than leases with a short expiration date. Levin pays a yearly fee to the state and recently spent $25,000 planting oyster shells on the bottom and "otherwise enhancing his lease."[157] Clearly, Levin invested in his resource for long term gains, yet the DNR jeopardized his lease rights through its application of the public trust doctrine.

While there can be little question that the public trust applies to the oystering rights of a bay that is both navigable and tidal,[158] the government is not concerned with the resource at all. Former Governor Martinez directed the DNR in pursuing this action. As DNR's David Hile makes clear, the issue was that non-leaseholding oystermen objected to the use of dredges on the leased lands. "Those same oystermen feared that by using dredges, the leaseholders would not hire the 10 to 15 fishermen they've retained in the past to gather the crop. Instead, one man could do the

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153. 229 U.S. 82 (1913).

154. *Lewis Blue Point Oyster Cultivation Co.*, 229 U.S. at 87-88.

155. Biff Lampton, *A Fishy Future for Florida Farming*, FLORIDA SPORTSMAN, May 1991, at 63.

156. *Id.*

157. *Id.* at 64.

158. *See* Crary v. State Highway Comm'n, 68 So. 2d 468, 471 (1953) (holding that a statute granting riparian owners bordering on tidal waters the sole right of planting and gathering oysters in front of their lands for 500 yards to seaward granted rights which were protected from private infringement, though still subject to the superior rights of both the public and the state).

work."[159] Florida has thus rejected both economic efficiencies and valuable property rights through application of the public trust solely to advance short term political ends.

The value of entrepreneurship afforded by private rights in Louisiana and Florida is not possible for commonly held land. Elected officials necessarily manage commonly held property, yet because of election pressures, they face an infinite discount rate when they regard decisions that reach beyond approximately four years. Therefore, "communal property means that future generations must speak for themselves."[160]

Conversely, simple market systems with foundational property rights allow those most optimistic about high future values to control resource decisions. "The highest bid will prevail, and the highest bidders will be those who believe the resource will be worth more in the future."[161] Therefore, the strongest preservation values will control resource decisions in a market system. As French economist J.B. Say noted in 1800, an entrepreneur shifts economic resources from an area of lower productivity and yield to one with a higher productivity and greater yield. The legal, political, and regulatory institutions should not obstruct this function. Conversely, the characteristic cost of communal property is inefficient over-utilization of the property.

## CONCLUSION

History is the story of evolving resource demands.[162] Over time, resources are utilized to provide for social advancement. History shows us that many of these resources have neared extinction. New economic models, however, reveal that resource devastation results from a lack of property rights rather than through the exploitation of established rights. Fisheries, bison, and timber suffered without enforceable management because any thought of preservation was a capturable windfall to one's competitors. There was no power of exclusion. While it has been said that we learn from our mistakes, history also repeats itself. Without the management conferred by private ownership, public trust resources will continue to suffer from the tragedy of the commons. The public trust doctrine today is at a crossroads where the courts have several options. The courts can continue along the road of expansion, allowing increasingly vast

159. Lampton, *supra* note 155, at 65.

160. Harold Demsetz, *Toward a Theory of Property Rights*, AM. ECON. REV. 57, 66 (1967).

161. John Baden, *Privatizing Wilderness Lands: The Political Economy of Harmony and Good Will*, *in* PRIVATE RIGHTS & PUBLIC LANDS, *supra* note 22, at 53, 61.

162. See Terry L. Anderson & P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J. LAW & ECON. 163 (1975) for a discussion of the historical dynamics functioning between ownership rights and economic and social institutions on the American Great Plains.

communal interests to be "protected" in ever wider waters. This approach not only allows unmanaged public access, it casts a harmful shadow on the sanctity of property rights.

Courts can also uphold the significance of private property rights, but then subject them to public usury easements. While initially attractive, easements conferred to the public carry infinitely high transaction costs. To each owner, the easement still exists as a liability. Unable to recoup profits from the resource, the owner instead is led to reduce his exposure to the appurtenant costs of public utilization, perhaps by destroying the resource.

Historically, public access was permitted because the population and technologic pressures did not threaten the resource. Today, both our population and our technologic capacity threaten to destroy the public trust resources. The public trust doctrine cannot allow for unlimited access and still result in efficient management.

The historic jus publicum/jus privatum distinction has been blurred so that it is no longer practically useful. The efficient alternative is for courts to work with the doctrine's historic interest. This is feasible in the face of today's pressures only by rewarding those who are most efficient at responding to the public's demands. To facilitate this management, it is necessary to establish clearly defined and enforceable private property rights and foster market efficiencies. By abdicating the jus publicum powers for a market system and by enforcing and clearly defining the jus privatum title, courts can assure a system which is responsive to changing public demands. This abdication of the public trust, if made by the legislature, is properly enforceable by the courts.[163]

By establishing within jus privatum titles the traditional bundle of property rights, the public will benefit from private environmental entrepreneurs who will strive to respond to public desire and capture the values established by the public's demand. In this capacity, a value is established for each resource opportunity, and those who are most efficient in providing utilization opportunities to the public will capture the most wealth. Those who are inefficient will be replaced by new entrepreneurs who more effectively provide the resource opportunities the public demands.

The public trust doctrine, far from being an institutional obstacle, can be privatized to afford today's society with a tremendous opportunity for efficient resource management. By following this path, courts can end the tragedy of the commons caused by unlimited public access. Courts can promote a more efficient, dynamic form of resource management. By

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163. "It is . . . grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly adjudged cases as a valid exercise of legislative power . . . ." Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 452 (1892).

relying upon markets which are responsive to public pressures and rejecting the judicial activism fostered by Pigovian theories of intervention, courts can most efficiently assure both continued public access and resource sustainability. In *Lucas*, the United States Supreme Court left the door open for the public trust doctrine. The Constitution, economic efficiencies and the health of our environment require that we slam it shut.